STATE OF MICHIGAN

COURT OF APPEALS

Estate of DARRYL HOUSTON PRICE.

NASTASSIA PRICE and ERIN PRICE-DUFFY, Personal Representatives for the ESTATE OF DARRYL HOUSTON PRICE,

Plaintiffs/Counter Defendants-Appellees/Cross-Appellants,

v

LORI JEAN KOSMALSKI, ESTATE OF RUDAFORD R. STERRETT, JR., and TRADE WORLD CORPORATION, INC. d/b/a TRADE DEVELOPMENT COMPANY,

Defendants/Counter Plaintiffs,

and

DART BANK,

Intervening Defendant-Appellee/Cross-Appellee,

and

JOHN L. NOUD and ALIX JENKINS, Personal Representative of the ESTATE OF JON K. JENKINS,

Appellees/Cross-Appellees,

and

THOMAS E. WOODS, Receiver,

Appellant/Cross-Appellee.

UNPUBLISHED
July 31, 2014

No. 314992
Ingham Circuit Court
LC No. 06-000228-NZ

Before: MURRAY, P.J., and O'CONNELL and BORRELLO, JJ.

PER CURIAM.

Plaintiffs successfully sued defendant for wrongful death. Plaintiffs then commenced the instant action to collect their judgment. They moved to appoint a receiver to seize and sell real property owned by defendant. However, the real property was secured by a prior mortgage held by intervening defendant Dart Bank, which was in default at the time the receiver was appointed. Dart foreclosed its mortgage and bought the property at the subsequent sheriff's sale. The receiver sought to have his expenses reimbursed from the sale, arguing that receivership expenses should be satisfied before the mortgage. The trial court agreed with the receiver and this Court affirmed. *In re Receivership of 11910 South Francis Rd (Price v Kosmalski)*, 292 Mich App 294; 806 NW2d 750 (2011), rev'd 492 Mich 208 (2012). Our Supreme Court reversed, holding that pursuant to statute, Dart's lien was superior to the receiver's. *In re Receivership of 11910 South Francis Rd (Price v Kosmalski)*, 492 Mich 208; 821 NW2d 503 (2012). The Court remanded the case to the trial court for entry of an order in favor of Dart. *Id.* at 233. On remand, the receiver moved for relief from judgment, asserting that he was still entitled to reimbursement from Dart as well as from plaintiffs and their attorneys. The trial court held that plaintiffs are liable for the receivership expenses, but Dart and plaintiffs' attorneys are not. The receiver appeals as of right and plaintiffs cross-appeal as of right. For the reasons set forth in this opinion, we affirm in part and reverse in part.

I. FACTS AND PRIOR PROCEEDINGS.

The background facts are taken from our Supreme Court's decision in *In re Receivership of 11910 S Francis Rd (Price v Kosmalski)*, 492 Mich at 214-217:

> The real property involved in this action was previously owned by Rudaford Sterrett, Jr., and secured by a single mortgage held by Dart, which was duly recorded on August 8, 2003. Upon Sterrett's death in April 2007, the real property was bequeathed to Lori Jean Kosmalski. At that time, the property was valued at $350,000, and the mortgage balance was less than $170,000.
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> In September 2007, Nastassia Price and Erin Duffy-Price instituted an action against Kosmalski to collect a judgment in an unrelated lawsuit. When they learned that Kosmalski had inherited the real property from Sterrett, they moved for the appointment of a receiver to seize and sell the real property in order to satisfy all or part of the judgment against Kosmalski. Dart was not provided notice of Price and Duffy-Price's motion for receivership.
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> In April 2008, the circuit court granted Price and Duffy-Price's request for receivership and appointed Thomas Woods as receiver.[5] One week later, the circuit court entered an amended stipulated order of appointment, which authorized the receiver to take immediate possession of the property and keep, manage, operate, and preserve it until further order of the circuit court. The powers and duties conferred on the receiver incident to his appointment included the authority to expend the property's equity or borrow funds for the repair, maintenance, and operation of the property necessary to preserve the property and make it saleable. Because the property was uninhabitable, the receiver borrowed

approximately $20,000 to finance substantial repairs. These repairs included cleaning the home and its grounds, repairing the heating and air conditioning systems, installing an alarm system, repairing the water system and pool area, and installing a fence.

Approximately one month before the receiver's appointment, Kosmalski had defaulted on the mortgage, and Dart initiated foreclosure proceedings by advertisement in mid-April 2008.[6] At the June 5, 2008, sheriff's sale, Dart—the sole bidder—purchased the property for $169,312.50, which was the balance due on its mortgage, and obtained a sheriff's deed to the property subject to a one-year redemption period.[7] On May 18, 2009, the receiver moved to void the sale, arguing that Dart had violated the court's receivership order, which prohibited any interference with the receiver's possession and management of the property. Dart subsequently intervened in opposition to this motion, asserting that Dart had validly initiated foreclosure proceedings and that, during the pendency of the redemption period, it had not interfered with the receiver's possession of the property. The circuit court denied the receiver's motion but extended the redemption period until August 25, 2009, to allow the receiver additional time to sell the property. When the receiver was unable to sell the property within the extended redemption period, Dart received title to the property effective August 26, 2009.

In October 2009, the receiver filed a motion seeking to hold Dart liable for payment of the costs and fees incurred in the administration of the receivership. The receiver claimed $41,874.57 in total expenses, which reflected the costs incurred in repairing, maintaining, and attempting to sell the property, fees for his professional services, and costs for attorney fees incurred as a result of the receiver's motions to enforce the receivership order. At the motion hearing, the receiver argued that because Dart had acquiesced in the receivership and the receiver's expenditures, he was entitled to reimbursement of his costs and fees from Dart. Dart responded that it could not be charged with the receiver's costs and fees when it had not consented to those surcharges.

The circuit court accepted the receiver's argument and entered an order on November 5, 2009, approving the receiver's final report and granting the receiver a lien on the net proceeds from the sale of the property in the amount of $41,874.57, which was given priority over Dart's preexisting mortgage. The lien order further required that the receiver relinquish possession of the property to Dart and discharged the receiver and canceled his bond.[8]

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[5] On April 18, 2008, Dart's former counsel, Jon Jenkins, acknowledged by facsimile his receipt of the circuit court's April 10, 2008, receivership order. However, in an affidavit dated May 20, 2009, Jenkins asserted that it was not until after initiation of the foreclosure process that Dart learned of the receivership order.

[6] In a letter dated May 27, 2008, the receiver acknowledged that he was aware of Dart's foreclosure action and indicated that he did not intend to interfere with the process.

[8] Dart raised for the first time in its application for leave to appeal in this Court the applicability of MCR 2.622(D), which confers on the circuit court the discretion to direct the party who sought the appointment of the receiver to pay the receivership expenses. Thus, the circuit court did not consider the relevance of the court rule when it granted relief in favor of the receiver.

The Supreme Court held that pursuant to MCL 600.3236, Dart's lien had priority over the receiver's. *Id*. at 221-222. The Court also dismissed the receiver's assertion that Dart should compensate him because it had acquiesced in the receivership. *Id*. at 228-230.

The Court also "acknowledge[d] the need for guidance with regard to priority and payment of receivers' liens," and stated that "courts appointing receivers should be cognizant of MCR 2.622(D), which permits a circuit court, 'on application of the receiver,' to set the compensation of the receiver, and to require the party requesting the receivership to bear the costs associated with it." *In re Receivership of 11910 South Francis Rd*, 492 Mich at 231-232. The Court added that in the case before it:

> By application of MCR 2.622(D), the receiver might nonetheless have received compensation for the expenses incurred in his administration of the receivership despite the order of priorities, potentially avoiding a situation like that here. That is, had the circuit court exercised its discretion under the court rule, [plaintiffs], as the parties requesting the receivership, might have been liable for payment of the receivership expenses out of their own funds and the receiver might not have been deprived of any compensation. [*Id*. at 232.]

The Court also stated that a receiver should "look[] first to the property itself" when seeking compensation for receivership expenses, but "[i]f there are insufficient funds . . . then the receiver may petition the court pursuant to MCR 2.622(D) to order the party who sought the appointment of the receiver to compensate the receiver for his or her costs and fees." *Id*. at 232 n 48. Finally, the Court remanded the case to the trial court "for entry of an order in Dart's favor consistent with this opinion." *Id*. at 233.

PROCEEDINGS FOLLOWING REMAND

Following our Supreme Court's decision, the receiver moved the trial court for relief from judgment under MCR 2.612(C)(1)(f)[1] to declare the sale and deed void and for Dart to pay

[1] That rule provides:

the receiver's expenses. The receiver first argued that the April 2008 trial court order that appointed him receiver precluded Dart from selling the property and that Dart's subsequent sale and deed violated the court order. Consequently, the receiver argued, Dart should be held in contempt and the sale and deed should be voided and the receiver should be reimbursed. Alternatively, the receiver argued that the plaintiffs and their attorneys could be held liable for his expenses under MCR 2.622(D). Initially, Plaintiffs and their attorneys did not respond to the receiver's motion.

At oral argument, the trial court denied the motion, finding that the Supreme Court's decision had foreclosed relief against Dart. Dart then submitted a proposed written order, which the receiver objected to, arguing that since plaintiffs and their attorneys did not respond to the original motion, they should be held liable for the receivership expenses under MCR 2.622(D). On October 3, the trial court ordered that the plaintiffs and their attorneys were jointly and severally liable for the receivership expenses.

Plaintiffs and their attorneys thereafter moved the trial court for relief from the order, alleging that although they had received the receiver's motion for relief from judgment, it had not been "calendared or otherwise docketed for response and/or opposition" because of "a clerical error." They also alleged that they had been unaware that the receiver was seeking relief against them, hence plaintiffs argued they should be relieved from the order under MCR 2.612(C)(1)(a) because of "mistake, inadvertence, surprise or excusable neglect." At oral argument, the trial court stated, "I am not clear in my own mind that I have the authority to enter a judgment against the attorneys. At the time I signed it, I signed it primarily because nobody came." Consequently, on February 6, 2013, the trial court issued its final opinion and order. The trial court first held that plaintiffs' attorneys were not "parties" under MCR 2.622(D) and were

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> (1) On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:
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> (a) Mistake, inadvertence, surprise, or excusable neglect.
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> (b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B).
>
> (c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.
>
> (d) The judgment is void.
>
> (e) The judgment has been satisfied, released, or discharged; a prior judgment on which it is based has been reversed or otherwise vacated; or it is no longer equitable that the judgment should have prospective application.
>
> (f) Any other reason justifying relief from the operation of the judgment.

therefore not liable for the receivership expenses. However, the trial court held, without elaboration, that plaintiffs were liable under MCR 2.622(D). This appeal then ensued.

II. ANALYSIS AND CONCLUSIONS.

CLAIMS OF RECEIVER

On appeal, the receiver argues that the trial court abused its discretion by failing to recognize that it could grant the receiver relief from judgment and order Dart to compensate him. According to the receiver, the trial court should have held Dart in contempt for violating the receivership order and required Dart to compensate the receiver for his expenses.

In response, plaintiffs and their counsel agree with the receiver that Dart should be liable for the receivership expenses. Dart, however, argues that the receivership was closed in 2009. Therefore, the receiver does not have authority to request the relief he seeks. Furthermore, the receivership should not be reopened, because its purpose, to sell the property, ended when the redemption period expired.

This Court reviews for an abuse of discretion the trial court's decision on a motion for relief from judgment. *Peterson v Auto Owners Ins Co*, 274 Mich App 407, 412; 733 NW2d 413 (2007). The trial court abuses its discretion when it chooses an outcome that falls outside the range of principled outcomes. *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010).

The receiver argues that the trial court should have overturned its order from 2009 allowing the foreclosure to proceed and held Dart in contempt for violating the April 2008 receivership order, which prohibited anyone from interfering with his administration of the property. According to the receiver, he raised this argument in the previous round of appeals in this Court and the Supreme Court. He contends that "the Supreme Court majority ignored [his] attempt to invoke the long-established rule that a cross-appeal is not necessary to urge an alternate basis for affirming the result below." However, the Supreme Court found that the receiver had not appealed the propriety of the foreclosure but rather the priority of the liens, and consequently "the validity of the foreclosure proceeding [was] not before [that] Court." *In re Receivership of 11910 South Francis Rd*, 492 Mich at 230 n 47. Thus, the Supreme Court found that the receiver failed to appeal the issue he now presents. This failure, in turn, restrained the receiver from moving for relief from judgment, because this Court has held that "relief from judgment is not appropriate where the party never even pursues an appeal from the trial court's ruling to this Court." *Farley v Carp*, 287 Mich App 1, 8; 782 NW2d 508 (2010). Accordingly, the trial court did not err in declining to grant the receiver's motion for relief from judgment.

Next, the receiver argues that the trial court erred in holding that plaintiffs' counsel could not be held liable for the receivership expenses. He contends that plaintiffs' attorneys are "parties" under MCR 2.622(D). Plaintiffs' attorneys dispute this assertion. For two reasons we disagree. First, the receiver was procedurally barred at this stage of the proceedings from raising the court rule as a means of relief. Second, even if he was not precluded from doing so, his argument expands the court rule beyond its plain language.

As to the procedural bar, there are two related grounds why the receiver could not raise application of MCR 2.622(D) on remand. For one, it is well-settled that "[w]hen an appellate

court remands a case without instructions, a lower court has the 'same power as if it made the ruling itself.' " *K & K Constr v Dep't of Environmental Quality*, 267 Mich App 523, 544; 705 NW2d 365 (2005), quoting *People v Fisher*, 449 Mich 441, 447; 537 NW2d 577 (1996). However, when an appellate court gives clear instructions in its remand order, it is improper for a lower court to exceed the scope of the order. *K & K Constr*, 267 Mich App at 544, citing *Waatti & Sons Electric Co v Dehko*, 249 Mich App 641, 646; 644 NW2d 383 (2002). "'It is the duty of the lower court or tribunal, on remand, to comply strictly with the mandate of the appellate court.'" *K & K Constr*, 267 Mich App at 544-545, quoting *Rodriguez v Gen Motors Corp (On Remand)*, 204 Mich App 509, 514; 516 NW2d 105 (1994). Here, the Supreme Court remand order limited the trial court to entering a judgment in favor of Dart. It did not, either expressly or impliedly, suggest that other proceedings could occur. Indeed, the Court made clear when discussing MCR 2.622(D) that the rule was not raised[2], but could have been. The Court, employing the subjunctive past perfect, suggested that such relief is no longer available to the receiver:

> By application of MCR 2.622(D), the receiver *might* nonetheless *have received* compensation for the expenses incurred in his administration of the receivership despite the order of priorities, potentially avoiding a situation like that here. That is, had the circuit court exercised its discretion under the court rule, [plaintiffs], as the parties requesting the receivership, *might have been* liable for payment of the receivership expenses out of their own funds and the receiver *might not have been* deprived of any compensation. [*Id*. at 232 (emphasis added).]

Had it determined further proceedings could occur on remand regarding application of the court rule it actually discussed, it would have done so.

Additionally, the doctrine of res judicata bars the receiver from raising an issue for the first time on remand that it could have raised before, and so the receiver was not entitled to raise this issue. *South Macomb Disposal Auth v American Ins Co*, 243 Mich App 647, 653; 625 NW2d 40 (2000). Accordingly, the receiver was barred from litigating whether it was entitled to any right of recovery under MCR 2.622(D) when it failed to *properly* raise it-even as an alternative argument-prior to remand.

Even if the receiver was not barred from raising the court rule at this juncture, his argument nevertheless would fail as to the attorneys being liable as parties under the court rule. The interpretation of court rules is an issue of law, which this Court reviews de novo. *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009).

MCR 2.622(D) provides as follows:

> When there are no funds in the hands of the receiver at the termination of the receivership, the court, on application of the receiver, may set the receiver's

[2] The Court held that this issue was first presented in Dart's application for leave to appeal in the Supreme Court. *Id*. at 217 n 8.

> compensation and the fees of the receiver's attorney for the services rendered, and may direct the *party* who moved for the appointment of the receiver to pay these sums in addition to the necessary expenditures of the receiver. If more than one creditor sought the appointment of a receiver, the court may allocate the costs among them. [Emphasis added.]

"Court rules are subject to the same rules of construction as statutes." *In re Leete Estate*, 290 Mich App 647, 655; 803 NW2d 889 (2010). In interpreting court rules, the aim is "to give effect to the intent of the drafters. *Id.* The first step is to examine the language itself. *Id*. "The drafters are assumed to have intended the effect of the language plainly expressed, and we must give every word its plain and ordinary meaning." *Id*. at 655-656. Plain and unambiguous language must be applied as written. *Id*. at 656.

Black's Law Dictionary (9th ed) defines "party" as "1. One who takes part in a transaction <a party to the contract>. . . . 2. One by or against whom a lawsuit is brought <a party to the lawsuit>." While attorneys represent parties, attorneys have not "brought" a lawsuit through their representation. Rather, "[a]n attorney is 'an agent or substitute, or one who is appointed and authorized to act in the place or stead of another.'" *FMB-First Michigan Bank v Bailey*, 232 Mich App 711, 725; 591 NW2d 676 (1998), quoting *Black's Law Dictionary* (Rev 4th ed). Stated differently, parties retain attorneys to pursue transactions or lawsuits for them, not to substantively join them in those pursuits.

Furthermore, the receiver's remaining arguments are unpersuasive. The receiver argues that because plaintiffs' attorneys were working on a contingency fee basis, they had a financial interest in the success of the receivership, and consequently they should be considered parties. The receiver principally relies on cases from foreign jurisdictions addressing provisions disqualifying judges from presiding in cases where they were related to a "party." See, e.g., *Johnson v State*, 87 Ark 45; 112 SW 143 (1908); *Roberts v Roberts*, 115 Ga 259; 41 SE 616 (1902). Those courts held that in cases where attorneys representing a party were related to a judge, "party" should not be strictly construed but should include the attorneys. *Johnson*, 112 SW at 145; *Roberts*, 41 SE at 618. This holding made sense in those cases, "for if a judge may be influenced at all in his judgment by the fact that a person, who is directly interested in the result of the suit, is related to him, the potency of the influence is not lessened by the absence of the related party from the record." *Johnson*, 112 SW at 145. However, the same rationale does not apply in this case, where the claim is not that "party" should be interpreted to include attorneys because to hold otherwise would contravene the intent of the rule. Accordingly, we would hold-if the issue was properly before us-that the trial court correctly held that "party" as used in MCR 2.622(D) does not include plaintiffs' attorneys.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. No costs are awarded to any party. MCR 7.219. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Stephen L. Borrello